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Implementation of the UNCTAD code of Conduct for Liner Conferences in developing countries

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THE IMPLEMENTATION OF THE UNCTAD CODE OF CONDUCT FOR LINER CONFERENCES IN DEVELOPING COUNTRIES

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To Marthe Adama Néné Seck,
my lovely daughter who bore
the two years of separation
with courage.

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INTRODUCTION

The maritime transports, although descended from a long history, particularly knew, on the exploitation plan well different shapes from those we observe today. These last date back to the apparition of the steamships' technic's propulsion.

For a very long time, the transports which were a big adventure, have put down carried on rare and expensive goods, carried in small quantities. At first, it was oil, wine, spices, etc. Then it did not concern an isolated activity, it was an element of a total operation. At the same time the shipowner was the dealer; he bought a complete cargo, tried routing it to sea, going risks towards its destination's point and reselled the merchandise.

Discoveries have given a new impulse to the maritime trade. Successively then we saw becoming famous the Portuguese, Spanish, Dutch, and British merchantships.

But the beginning of their contemporary history may be situated towards the period, on which England having made a free exchanger choice's, abolished the "Cromwell Shipping Act", which long since reserved the English trade to the British ships.[1] It is from this resolution that follows its fleet's powerful ascending, which during the so called time of "free flow of shipping" had dominated the world maritime trade.

From this date, the technical improvement in the shipbuilding accelarated, and led an unprecedented progress of the maritime trade. On the request's side, the free exchange's adaption deeply modifies the traffic's course nature which does not concern not only onerous and exceptional goods, but also becomes a real masstransfer, particularly of raw material and agricultural products.

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1) Rodière: "Sea-freedom and trade freedom", TGDM, 1976, p. 114 ff

Parallel, the great migratory movements, as well towards USA and Australia, as metropolis towards their African and Asian Colonies, supply an intense traffic of passengers and goods.

All of this leads to a rapid and deep evolution of maritime transport, which soon takes the aspect, that we know of them today, and requires from the international community to be taken charge of, in order to give them a sound aspect, on agreements and regulations' basis.

Taking account of their specification's important costs, the shipowners were conscious of trying to regulate them on conferences' basis, according to their interests.

So, conferences are maritime transports' groups, practicing on a route determined by geographical limits, inside of which they operate with transports' conditions and common freights ensuring the given frequencies' respect.

Rodière defines them as a group of companies calling at a same route, on a same geographic zone, which because of agreements, perceive uniform freight rates.[1]

In similar way UNCTAD, in its 1970 report, describes them as groups of companies exploiting groups on which because of fundamental agreements, perceive uniform freight rates.[1]

For other definitions, it concerns private agreements between shipowners, whose aim is to settle a common freight tariff and rationally regulate the traffic.[2]

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1) Rodière: "The Code of Conduct of the maritime Conferences" JDI, 1978, p. 335

UNCTAD Doc TD/B/C4/62, 19 January 1970, on "the maritime Conferences' practices and maintenance of adequate maritime services"

2) Foyer: "The shipowners' Conferences", Rec, SD, 1965, p. 159

Moussu: "the Code of Conduct of the maritime Conferences" DPCI, 1975, p. 129

Anyhow there it concerns nuances more than differences, and all of these definitions try, under a synthetic formula, to include a reality which at once is complex and varied. For trying to surround it nearer, it is possible to examine the Conferences under an institutional, functional, and juridical three-lighting.

Under the angle of institution, any conference, as beside any agreement, in the beginning rests on a Contract more or less formulated, and gives birth to a group itself, also more or less flexible, which can be composed of an association or a group relatively stable, with a secretariat and an administrative organization, precise enough.

Under the functional aspect this time, the conferences represent very distinct advantages, and disadvantages according to the interested parties.

For the shipowners (members) it is beyond all question that they operate a traffic's regulation and more precisely a competition's control, allowing to anyone to benefit from a reasonable part of profits, at the same time having relatively moderate losses.[1]

On the other hand for the shippers, at least for the shippers customers, they present safety's advantages, relatively constant freight rates, and also the guarantee of vey important services, and especially those the ports of which are generally badly called at, will be regularly visited by the Conferences.[2]

1) The industrialized countries' shipowners also pretend that the Conferences constitute an instrument, which takes into consideration the specific position of the third world's shippers. The entry into service of specialized ships, authorizes the exploitation of riches till shown in a favourable light, as the promotional freight rate's fixing priviliges the exportation of developing countries' nontraditional products. See Moussu: "The New Dehli Conference and the maritime transports." AFDI, 1968, p. 642

2) The mentioned advantages are recognized either in the practice or in the texts.

It is right that these last estimate sometimes that the Conferences represent an alienation of their freedom and sometimes want to escape from agreements and contracts, which are concluded with the Conferences.[1] And this unfavourable point of view is shared by the outsiders,[2] the independent shipowners, who often would like to make them burst out. Recently the attacks came from developing countries, which saw in it a shackle to their national flag's expansion.[3]

Finally on the legal side, we can notice that these Conferences' statutes are realtively nebulous. In that respect we can observe an opposition on principle at least between the private international law point's of view, which constitutes an international society's right, here of shipowners and shippers.

Although it is, these Conferences appear as supra national groups which escape or try to escape from state's ascendancy. These last try to recover their influence by diverse measures, either by policy's law or by immediate applying law or by international conventions.

But really, the Conference did not reach this physiognomy immediatly. The have known a troubled and difficult history.[4]

The first was created for the United Kingdom-Calcutta traffic in 1875, because the Suez Canal's opening in 1869 had provoked a very hard competition between shipowners; and the British who assured the traffic between the Western European ports and the Indian coasts, decided to end their rivalry and to propose a common freight tariff.[5]

1) Rodière: "Conferences' critical examination", TGDM, 1976, p. 46 ff.

2) This category is also called outside Conferences, it means shipowners stranger to the group.

3) Many of these countries which actually give themselves a modern maritime legislation, want a national merchant marine (Ivory Coast, Senegal, Gabon ...) they think that the Conferences block their development.

4) Foyer, ibid. p. 160

5) Rodière, Foyer, Ibid.

Then from 1875 to 1890 it was the full period of tentative effort and negotiation. The agreements between shipowners was nothing else in fact than armistices' signatures and applications in the traffics' war that surrendered themselves, armistices often broken, but practically always negotiated again.

From 1890 to the first world war, the armistices' agreements are going to leave the place at the organization of all the big Conferences' system and their expansion was such that in 1913 we already could find again practically most of the Contemporary Conferences. The North Atlantic German Conference, which prefigured the greatest actual Conferences as by its power than its organization has been set since 1892.[1]

The first world war occasioned the system's rupture until around 1920 where all the conferences before war were re-constituted to which some were added as one goes along new traffics' contracts were developing.

During this period, conferences Golden Age, where the system growing more by new freight pools' implementation, was for all that disturbed from time to time by serious internal crisis, generally provoked by important members' retreat, finding their rights inadequate, or by external events as the Pound Sterling's devaluation in 1931.

The second world war, as the first, lead to a conflict of all the Conferences.[2]

The after war period is marked by a very fast reconstruction and the German and Japanese returned in force, very important and practically are in all the conferences from 1953.

1) This Conference has been constituted for the first time in 1892 and organized again in 1907. See Foyer, ibid.

2) Moussu, AFDI, 1979, p. 687

Since 1960, they became stronger in all the fields, but we have also to recognize that the climate changed deeply.

At first the maritime technic was extremely transformed, particularly by the containers' technic arrival which actually became more and more important.

The competition also changed intensively on account of the newcomers' entry on the maritime market, especially ships, either flags of Convenience or developing countries, or Socialist States.

At last and above all, the political climate has changed in respect of States' constant intervention.

This is plotting in large draughts the maritime Conferences' history, that justifies so the heading of our first part:

ORIGIN AND EVOLUTION OF THE MARITIME CONFERENCES

So it seems natural that the research of adequate solutions concerning the Conferences' phenomenous showed a trend towards international and legal instruments, which not only ensure some non-discriminatory's principles as regards shippers and competitor's guarantee between maritime companies, but specially allow the poursuit of general interest essential aims of states which shelter the principal ports of call served by the Conference.

Among the employed instruments with this end in view of the international practice, the most recent and the most developed is the Conference on the Code of Conduct of maritime Conferences approved in Geneva, of which we will see in detail the essential points in our second part.

TOWARDS AN INERNATIONAL SOLUTION OF MARITIME CONFERENCES?

The UNCTAD Code of Conduct

PART ONE

ORIGIN AND EVOLUTION

OF THE

MARITIME CONFERENCES

THE MARITIME CONFERENCES SYSTEM

In order to demythicise this notion of Conference and to clarify some problems, we will study:

- its internal functioning
- its contractual relations and the kind of agreements getting knotted in such an organization
- its diverse activities.

But we have to note before that in all the Conferences, the common will is expressed by an Assembly having a general and deliberative power and which functioning is governed by the majority's principle.

In such an administration all the Conference's companies members are represented and each one following the statutes' habitual norms, conveys only one vote independently of the volume of its traffic's part.

Generally the statutes forecast a President, sometimes accompanied by his board and who is almost always member of one shipping direction for which he continues working. He especially has functions of reprentation and convocation of the Conference and chairmanship of the agents.

Beside these functions some others are foreseen and attributed to the secretary-general who provides for the realization of the Assembly and the President's decisions, and for the daily administration, particularly looking after the board's direction, the other agents' work in preparation and the relations between members and third part.

Sometimes the secretariat's function is imparted by rotation to the companies' members and some other times it is framed in the Conference's structure. In both cases, one utilizes the companies members' staff or the Conference itself.

Often agents having preparatory and advisory activity mainly are instituted: they are the boards and the committees. Studies and propositions' technical tasks on topics interesting the Conference are imparting to them, and particularly on the tariffs. Sometimes also control's assignments on the members are alloted to them.

Finally the financial funds of the Conferences' administration proceed from subsciptions payed by the shipping and divided according to percentages appointed in advance. They are either subscriptions corresponding exactly to expenses or equivalent to contractual subscriptions.

Section 1

THE CONFERENCES INTERNAL FUNCTIONING

There is no conference type and no unique system. The obligations contracted between the shipowners or by them as regards to the thirds differ from a conference to another.

There are Conferences which structure is very lax such as the freight agreements, some others which are strongly framed and have permanent and full administration.

Let us try dismounting the internal mechanism of these last which are the majority beginning to analyse their composition.

P1 CONFERENCES COMPOSITION

A The Members[1]

Conferences are constituted of:

- full members with full rights as specified in the original statutes.

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1) UNCTAD Doc TD/B/C4/62 19 January 1970

- and affiliated members.

A1 The full membership

There may be small differences among them in the way the frafic's rights spread to the zone covered by the Conference, or in contrary are limited by this or that member to some parts or other parts of this zone. Other limitations may also intervene on the voyages' number, yearly accomplished, or in the importance and the kind of tonnage liable to be transported.

The nature and the exact importance of the limitations applied to any full members share are defined in the Conference's internal agreement.

Amongst these full members there may also be some companies, who for some reason or other (conflicts, war, Suez Canal closing for instance) stop their service on a given relation. As far as they do not loose the rights obtained under some reserves and maintain their right to vote notably. They are the non active members, often called "sleeping members" in contradiction to active members i.e. those ensuring a permanent and regular service.

A2 The Affiliated membership

or associated membership is granted to a company when it has only an occasional interest to a concerned traffic, or the Conference is unwilling immediatly to grant full membership to a new entrant and prefers that it firstly shows its ability during a time, generally fixed in advance.

It is often for a Conference a convenient solution to invite an outsider or a company intending to open a service between all or some of the countries it covers, to join it, in order to avoid an unpleseant or even dangerous competition, without granting it all the rights and benefits off full membership.

Generally the affiliated members can attend the Conference's meetings, but they have no right to vote.

Affiliated members as full members are subject to all the duties and obligations particularly in respect of the freight rates, the tariffs' general conditions and also the illicit practices' prohibition.[1]

Nevertheless, they do not often pay any admission fee and their contribution to the Conference's expenses is also less than that of full members and they are not called upon to pay a security deposition put up a good performance bond.

B Admission of new members

The highest characters of the Conferences' structure, are those bounded to the criteria for admission of companies. In that respect we remark on the two largest types of Conferences:

- "Open" Conferences
- "Closed" Conferences

Closed conferences which are also the oldest, are those where the decision whether or not to admit a new line, rests exclusively with the existing members of the Conference concerned.

Generally these Conferences cover sufficiently protected traffics, either by their eccentricity, the particular conditions of operation in the concerned ports, which require a long practice or a high efficiency specialization, or by the protection de facto the benefit from shippers or even states.

Open Conferences are those with every line having the intention and the ability to offer a regular linerservice in the conference's area of operation can join on application, subject

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1) the list of the practices, generally considered as illicit figures to the doc. alr. indicated: TD/B/C4/62 19 January -70

only to acceptance of the internal conference agreement and the completion of any formalities, such as payment of admissio fee and security deposit, which are required.[1]

An example of open Conference is the one which operates in the overseas trade of the United States of America, the Federal Maritime Commission has directed that Conference agreements shall contain a provision substantially as follow:

> "Any Common Carrier by water which has been regularly engaged as a Common Carrier in the trade covered by this agreement. or who furnishes evidence of ability and intention in good faith to institute and maintain such a Common Carrier service between ports within the scope of this agreement, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this agreement may here after become a party to this agreement by affixing his signature thereto."[2]

The admission to membership of any conference operating in the overseas trade of the USA can not be denied to any applicant exept for a "just and reasonable cause" and an advice of any denial of admission to membership together with a statement of the reasons therefore, has to be furnished promptly to the Federal Maritime Commission.

A Company seeking entry to a Conference has:

- first to make the request stipulating the nature of the service she wants to execute: information in respect of each vessel to be employed in the trade, whether it is owned, chartered or otherwise acquired, proposed frequency of service, contemplated loading and discharging ports and name of agents.

- to provide a sailing schedule, if possible. To inform the Conference of any forward Cargo Commitments made at rates or under terms and conditions at variance with the rates, terms and conditions prescribed by the Conference.

- Because the size of the tonnage is an important factor,

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1) Doc TD/B/C4/62/Rev. 1, p. 95

2) Cunningham: "The Administrative History of the Federal Maritime Commission Self Policing Rules", JMLC 1979, p. 43 ff. p. 195 ff.

the company should be in a position to accept the minimum service obligations, for instance to offer one sailing every month or every two months depending on the requirements of the trade, and should have enough vessels to place in the Conference trade for this purpose.

- The Company should have sufficient financial,and Commercial standing and if possible to bring background experience of liner operation.

- Finally the Company is obliged to adhere to the sailing programmes as announced to handle cargo carefully, to be able to meet the shippers' claims for any damage to cargo, and to promtly refund deferred rebates which may be due to the shippers.

In principle, Conferences prefer an applicant to have owned tonnage rather than chartered tonnage, since ownership of vessels is evidence of the intention of the applicant to provide a regular service on a long-term basis. In practice this condition is not rigidly insisted upon in every case, and there are instances where national liners have been initially admitted to the Conferences operating in their hometrades an the basis of chartered vessels when the intention of ability of the line to own tonnage in the near future was evident.

We notice an evolution towards the formula of "Open Conferences" or in any case, towards a Conference where the shipowner who can present qualities of adequate services, has after a little while as outsider or affiliated member, been lucky enough to be accepted.

The national shippings of developing countries meet with only few difficulties to get in a Conference as soon as they wish it.

At last, those from Eastern countries more and more have the tendency to request and obtain their admission in the Conference and they behave inside as the most traditional and the most respectful participants of the regulations.

Section 2

THE CONTRACTUAL RELATIONS IN THE CONFERENCES REGIMES

The conferences' discipline regulates the traffic's distribution between its Companies and fixes the tariffs they undertake to practice to the shippers, specifies the quota of each member by the attribution of routes, number and the voyages' calendar. Therefore we will start studying firstly:

- The internal agreements, which are the Conference's documents and constitute its basis.

- The statutes or memorandum of agreement and the internal regulation, which both ratify these internal agreements.

- The formation and the communication of the Conferences decisions.

But often, the Conferences agreement creates a real integration of its members activities through the formation of pool. So it would be interesting to know:

- what is a pool?
- how it is organized

P1 THE INTERNAL AGREEMENTS

It is essentially agreements between members of a same Conference. They are intended to limit, may, to supress the competition between Companies members and to face up the out-

siders one.[1]

They are sanctioned by:

- Statutes, or memorandum of agreement, completed by an internal regulation constituting the Conferences agreements properly so called.
- Eventually pool agreements.

It is internal and confidential documents, which before being signed generally require long negotiations between shipowners. On principle they are never communicated to shippers, nor even to governments, except in some rare cases, as the Conference's agreements ruling the USA external traffic (Traffic USA+North Africa, for instance) and considering as public documents and deposed beside the Federal Maritime Commission.[2]

The scope and the duration of these agreements varry a lot, according to conferences and notably to competition's risks between Companies members and that effective or potential between these last and the outsiders.

A <u>The Statutes or Memorandum of Agreement</u>

The statutes define:

- The zone of activity covered by the Conference, i.e. the list of names of countries or ports called at, either to the loading or to the unloading, or both together.
- The list of members with mention of their trade-name, their adress, and their status as full members or affiliated member.
- The rights and obligations of members.

1) These Companies which are not engaged in the Contractual bouds surrender themselves to a severe fight with the Conferences members. An evidence of this can be given by refering to the "fighting ship" technic, a ship chartered by the Conferences Shipowners and carrying at loss goods in order to exclude from the traffic any competition of independent shipping. However Article 18 of the Code of Conduct proscribes this practice.

2) Cunningham, ibid. and
Lowenfeld: "The Federal Maritime Commission and the Conferences.", 1JMLC, 1969, p. 21

- The modalities of admission, retreat, suspension or exclusion of a member.
- The applicable penalties in case of infraction or violation of agreement by one of the members.
- The amount of the security or bank deposit ensuring the payment of these penalties.
- The way to regulate disputes between members.
- The way to settle disputes between conference and shippers.
- And the duration of the concerned agreement.

B The internal Regulation

It varies of course according to the Conferences. As an example there is a view of internal regulations of a Conference.

Firstly it defines the composition of the Conference and the rights of the fullmembers and affiliated members.

Then it deals with its administration (role and power of the president, of Consultative Committees, its headquaters and official language), of the procedure concerning the meeting, the modalities of admission and resignation of members, the way decision are taken (method of vote, seeret of deliberation, diffusion of resolution) and finally with the procedures of modification of the regulation itself.

It is fitting to notice that Developing Countries give much attention to the creation of Local Committees, estimating that these understand better their national problems than the Companies' answerables having their headquaters in foreign countries.

These Committees are composed of the regional agents of shipping members of the Conference.

They also are intermediary between them on one hand and the shippers and their local board on the other, as well as the Governments and the port authorities.

Yet their importance depends on the power of decision that the Conference delegates them or the importance she attaches to their recommendations.

C Formation and Communication of the Conference decisions

You should not believe that decisions come out by a magic from the minds of the Conference's Administration. Even there concerning minor problems, are subjet of consultations between shipowners, under the direction of the Secretary General of the Conference.

A proposition emanating either from shipping, or from the Conference's service will be a decision when she collects the majority provided by the regulation. The most important are taken during a deliberation of all the members and they are confidential.

If they are the subject of minutes, it is drawn up by the Secretary General under the President's control and it is only for the use of participants.

Once beingtaken, how are they communicated to shipping and customers?

The diffusion of decisions to the customers is made by letters or telex in the case of general problems, and eventually freight rates' modifications, if it interests the tariffication's matters.

In the Conferences' frame, generally these are specialized and permanent Committees, which elaborate before its holding, the documents on the basis on which the participants are working.

It concerns the tariffing Committees, Committees of managment, Control and Administration, Their studies end at propositions made to shipping.

P2 POOLING AGREEMENTS

Pooling can take various forms ranging from agreements to control the number of sailings of each pool member to a system in which the actual cargo carried or revenue earned by each member line is controlled.[1]

Let us see first what is a Pool?

A Definition of a Pool

Pooling agreements are regarded by the Conferences as "self imposed restrictions" agreed between member lines to provide the proper number of sailings to handle the expected cargo movement.

The pooling system enables the Conferences:

- to eliminate wasteful competition for cargoes between the member lines.
- to obtain the optimum cargo for each vessel berthed.
- to provide adequate berth coverage to meet trades' requirement
- to cover the trade in a more economic manner and
- to maintain freight rates at a reasonable level.

A pool is subordinate or collateral to the Conference. In addition to the allocation of sailings, the Conference lines may also pool cargo and, or revenue pool.

- A cargo pool usually relates to a specific commodity or group of commodities and under the pool each member is entitled to carry a specific percentage share of the freight tons of the items concerned carried by all members of the pool.

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1) UNCTAD TD/B/C4/62 19 January 1970, "Conferences Practices and Adeguacy of shipping services"

- In a Revenue Pool the total freight revenue of all the participants in the pool is shared according to agreed percentages. Usually the revenue paid into the pool is either a fixed percentage of total revenue or total revenue minus a fixed amount per ton carried.

In practice, in a majority of cases, the pooling arrangements cover both cargo and revenue. It is the combined cargo/revenue Pool which controls both the quantity of cargo carried and the revenue earned, so that each line has an obligation to lift a certain percentage of the cargo and to pay into the pool a certain proportion of the revenue arising from carrying cargo. The effects of overcarriage and undercarriage are then adjusted by the pool.

B Organization of a Pool

The basic document of a pool is the pool agreement; containing generally:

- the list of participating members with headquaters and adress.
- the nomenclature of traffic zone covered by the Pool.
- a definition of the aim of this agreement.

In most of the cases, Pool arose from the necessity for conference members to eliminate cartain practices deriving from a competitive situation that the only Conference agreements did not allow to avoid. For instance, inside a Conference, the various companies can face each other for obtaining to their ships the richest or the easiest carrying cargoes, deserting voluntarily so called "poor goods". The creation of a cargo or revenue of combined cargo/revenue Pool. puts an end to this rivalry and guarantees the transport of the less interesting goods.

- A pool agreement excludes some goods the nature of which requires specialized equipments (refrigerated products, explosive minerais en vrac, bank notes ....)

- A pool agreement, and it is nearly the most important point, fixes the quote of every participant. The results obtained in the 3 or 4 previous years of his creation by each company in the traffic he has opened, play a decisive role in the determination of these parts.
- A pool agreement also determines the procedures of the revenue pool abatement, its duration, the regulation of the surplus, deficits, the modalities of the admission of new members, the cases of suspension, the arbitration procedures.

In corollary he always implicates the creation of a Committee so called of rationalization or of coordination, the principal aim of which is to organize all the departures of the pool members according to circumstances and necessities of the traffic.

Section 3

THE CONFERENCES ACTIVITIES: THE RELATIONS BETWEEN THEM AND THE SHIPPERS

As groups of companies exploiting maritime routes, the Conferences have very precise activities in order to organize and regulate the traffic which is realized under their care and on the itineraries they control. These activities are:

- The fixing of the Conference tariffs
- The institution of loyalty arrangements.

P1 THE CONFERENCE TARIFF

In any Conference the basic agreement between the members is to charge uniform rates. In order to effectively prevent rate competition between members, this is supplemented by rules, covering matters such as calculation and collection

of freight charges. The agreed rates and rules governing calculation of freight charges of a Conference are given in the Conference tariff. In working out the freight charges on any commodity between the ports served by the Conference the tariff is referred to the members of the Conference and their agents.

Conference tariff vary widely in size, and may further depend on the period for which the Conference has been operating on the route.

Conference rates are basically of two types:

- class rate: is a rate related to a number, called a rating, which represents many commodities.
- Commodity rate: is a rate stated on a specific commodity of a particular description.

A Conference tariff consists of specific rates on various commodities. If a commodity is heterogeneous and the various varieties of the commodity have wide differences in their transportation characteristics, such as stowage, packing, value, then a series of rates are charged on the same commodity depending on the description of the particular variety of the commodity.

Normally in a Conference tariff, specific descriptions are provided for all commodities that move regularly and little cargo moves at the general cargo rate except new items. On the other hand, the tariffs of some Conferences have a rather limited list of specific rates, with the result that the general cargo rate in practice applies to a number of items. Since the scope of items that may be charged the general cargo rate varies widely from one Conference to another, a comparison of the general cargo rates in any two trades could be misleading.

Conference tariffs contain a classification of ports into basic ports, other ports to which direct sailings are made, and ports served with transhipment. Regarding the classification of ports served by the Conference for the purpose

of charging rates, 4 questions were asked to them:

1 How are the ports served by the Conference classified into basic ports and ports to be served direct with an additional charge?

2 What criteria are used to determine or change the above classification?

3 How are additional charges for direct ports which are not basic ports arrived at?

4 What minimum inducement of cargo per call on average is considered necessary for a port to be given the status of a basic port?

In reply, the Conferences stated that:

a The requirement of the trade, i. e. commercial importance of the port.

b The volume and regularity of traffic passing through the port.

c The port facilities, the speed of turn-round.

d The deviation involved, port charges, port conditions.

Additional charges for ports other than basic ports were arrived at on the basis of the extra costs of a vessel's deviation from the main route and differences in cost of cargo handling, port expencses and time required to despatch a vessel between ports not of the same classification.

A Publication of the Conference tariff

There is a demand from shippers for copies of the Conference tariffs to be readily available, so that they can promtly, provide rate information to overseas trading partners without having to inquire about the rate from one of the lines or the Conference secretariat.

On the other hand, the Conferences point out that reading the tariff is an intricate task. For example, some commodities have graded rates which vary with a combination of factors, such as value, stowage, and the physical or chemical properties of the cargo. If shippers did not read the rules and regulations

governing the tariff accurately, they would work out the freight charges on a consignment wrongly.

They also point out that a Conference tariff is sometimes a very bulky and costly book and it would be a waste of time and money for a shipper interested in a single or a few commodities to take the trouble of maintaining his copy up to date.

A major objection of some of the Conferences to the publication of their tariffs may be that a published tariff is very easily available for existing or potential competing lines and that this could make way for a rate war.

Published freight tariffs give shippers an opportunity to make their own evaluation of the justification or otherwise of the rates on individual commodities.

It is observed that most Conferences are generally argeable to make a copy of its tariff available to the shippers who regularly ship cargo in the trade to which the tariffs apply. The Conferences are, however, disinclined to make available copies of tariffs covering trades in which the shippers have no direct interest.

The Conferences operating in the overseas trade of the USA are required under the Country's legislation to file copies of their tariffs and amendments thereto with the Frederal Maritime Commission at least 30 days before the tariff or tariff amendment becames effective. They are also required to make arrangements to sell copies of their tariffs and any amendment that may be issued from time to time to all interested parties.

Clearly, the publication of the tariffbook is not inimical to the operation of Conference services.

B Stablity of freight rates

One important claim made by Conferences is that they give to importers and exporters stability of freight rates which they believe will enable long-range planning of trade to take place, and protect the traders from the risks of sudden changes of one of the cost constituents.

These claims are first, that they give such stability, second that this stability is in itself desirable, and third, an implicit that Conferences are the best way to give such stability.

The Conference argument on these points has been succinctly presented in the following terms:

> " to take fixed rates first, a merchant or exporter has a great many factors which influence his costing, such as labour cost, production cost, competitors prices: he does not want to add to these the danger of substantial variations in transport costs ... To meet this wide spread desire on the part of the shippers is one of the main reasons why cargo-carrying lines combine into Conferences and agree to quote the same rates and conditions for similar cargo to all shippers."[1]

It is also argued that the shippers have a preference for rate stability even if it is accompanied by a higher freight level as compared to tramp rates.

It is generally held by the liner Conferences that free competition in liner shipping is more likely to create instability in rates and that, the Conference organization is necessary to provide rate stability.

Prima facie this seems logical, as in linershipping the fixed costs are a high proportion of the total costs of making any voyage.

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1) "the shipper and the Conference system" published by the United Kingdom and Continent/India and Pakistan Conference, London, May 1963, p. 5-8

As a result, there is in the short run much scope for rate cutting in respect of individual items. Rate stability, therefore seems possible only if the lines enter into an agreement or understanding to charge uniform rates.

The preference of shipowners for rate stability arises because it apparently facilitates long-term investment planning. The operation of a liner service basically implies a long-term view of the trade on the port of the shipowners. Factors such as the difficulties of entering the trade, high investment employment of tonnage ... frequently make it difficult for a line to shift tonnage from one route to another. Possibilities here vary and while some lines find tonnage-switching practically impossible, other see much more flexibility, including the possibility of the use of chartered tonnage on occasions.

P2 LOYALTY ARRANGEMENTS

The purpose of loyalty arrangements is to ensure that all liner cargoes in the sphere of operation of the Conference, the carriage of which the Conference members wish to reserve for themselves, are obtained by the members of the Conference, and that non-Conference competition does not exist at ports the Conference wishes to serve. Therefore, loyalty arrangements in one form or another exist in most of the trades covered by Conferences.

The three forms of loyalty tie are the deferred rebate system, the dual rate system and the immediate rebate system.

Under the deferred rebate system, a shipper who utilizes exclusively the vessels of the member line of the Conference for carriage of cargoes between the ports covered by the Conference, and considered by the Conference as Conference ports for the purpose of assessing his loyalty to the Conference, is entitled to receive a rebate of a certain percentage of his total freight pyaments. The rebate is computed for a designated period ("shipment period") usually 3 to 6

months, but is paid after a period ("deferment period") of the same lenght following the shipment period, on the condition that the shipper has given his exclusive support to the Conference lines, both during the shipment period and the deferment period.

The points which the shipping Conferences generally advance in defence of the loyalty arrangements are:

1 They are necessary to enable the Conference to maintain a regular service at stable rates.

2 Shippers are not forced to accept loyalty arrangements, and

3 They do not debar the entry of an outsider into the trade.

The Conferences maintain that in their operation of a service there is essentially an acceptance of both favourable and unfavourable conditions. Any Conference covers a wide range of ports with varying efficiency and wide differences in cargo movement, while the Conference vessels accept mixed cargoes with wide differences in direct costs and freight charges.

No shipper, it is argued, is compelled to patronize a Conference since, barring the difference between the rates charged to loyal and non-loyal shippers there is no discirmination between loyal shippers and others, for example, in the conditions of service.

The Conferences claim that the shippers accept loyalty ties of their own free will and that they are free to use both Conference lines' vessels and outsiders by paying higher net rates.

They also claim that the loyalty arrangements are not impregnable in the sense that any outside line, which is not an occasional caller, but has the intention of operating a regular service, can break into the trade, is also not wholly true. To get a footing in a Conference trade where loyalty arrangements exist, an outsider line has not only to convince the Conference shippers of his ability to continue to charge

less than Conference rate in the future, but also to reimburse the Conference shippers for the losses they would incur through either the loss of accumulated deferred rebates or through a legal claim for damages for violating the loyalty contract.

THE EXTERNAL INTERVENTIONS TO THE CONFERENCE SYSTEM

The chill wind of liberalism following the second world war and the aspirations to freedom coming out in almost all the third world countries, not only in political field, but also in economical matters, have called in question again the maritime Conferences system.

In the private domain, shippers Councils took form and became the faithful interlocutors, although sometimes hard, of Conferences.

This resolution extrait adopted by the International Chamber of Commerce in July 1961, is more over significant by supporting the Conferences system:

> "Essentially in the international field, where the Conference system is exerted, it is a guarantee for users, and these would consider as prejudicial to trade and public interest, if unilateral and governmental regulations would arrive to destroy this system, not only to the detriment of the whole international traffic, but at the sacrifice also of the economy itself that such a legislation would have aimed to protect."[1]

In 1963 the European Ministers of Transport adopted a resolution approving the functioning of the Conferences system, following what the European Conferences and European shippers councils decided to meet regularly in order to discuss Common interest questions and to try to regulate their disputes.

Moreover these discussions have helped considerably to the normalization of Conferences practices and a series of recommendations have been elaborated in a booklet jointly written by the Committee of European National Shipowners' Association, more commonly called C.E.N.S.A. and the European Shippers Councils.[2]

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1) JMM, 1979, p. 3092

2) The booklet entitled "note d'entente" has been signed in London 21 October 1964 between the European and Japanese shipowners and European Shippers.

After Tokyo's meeting in February 1971, the European and Japanese Ministers, the C.E.N.S.A. in collaboration with the European Shippers Councils, elaborated and diffused in October 1971 a Code of Practice, which has since been adopted by a great number of Conferences, established in Europe.[1]

In their turn, the highest international instances seized on the question, and UNCTAD instructed to study the maritime international legislation problems, adopted in February 1971, a resolution which tends to be the main question of the day during its next works, the settlement of a Code of Practice for the Conferences or regular lines shipowners. (We will deal with these international interventions in our second part.)

But a dispute of the conference system will not be long to emerge. Its characteristic and some of its practices will be so violently denounced that it will end by evocating the necessity of a "moralization" of Conferences on behalf of two morals:

- On behalf of the economic liberalism in order to control them strictly.
- On behalf of the aid to bring to developing countries so that the conducted action more and more shows a trend towards a publicization of the institution.

Now we are going to study first these attacks comming from each side, before seeing the diverse and possible methods of regulation, because more and more under State control regulations appear.

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1) On its preparation: UNCTAD TD/128, 14 December 1971, JMLC, 1972-73, No. 4, p. 657

Section 1

CRITICISM TO THE CONFERENCE SYSTEM

The Conferences functioning left to the free initiative of maritime companies, has been severely criticized so much that one could talk about instruments of a outworn and hateful imperialism.[1]

The most moderate of its detractors have underlined the exacting character of the system, not only for the national economies of developing countries notably, but also for the shipowners themselves.

Truly several authors underlined that the organization's users did not have any real possibility to negotiate the tariffs which were unilaterally established by the Conferences, without reflecting in an appropriate manner the general aspect of freight market.

They also added that the loyalty agreements in fact deprived the shippers of any power of choice, that any competition between carriers calling at the same maritime route, could be excluded and finally that itineraries and means of transportation were favoured independently of nationality and national planning's criterium.[2]

At all times then, Conferences have been criticized, curiously as much by shipowners themselves, Governments, and as by developing countries and shipper above all.

P1 THE SHIPOWNERS

Even if this seems paradoxical, sometimes shipowners feel

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1) Moussu: "The New Dehli Conference", AFDI, p. 642
Zamora: "Rate Regulations in Ocean Transport: Developing Countries Confront the Liner Conferences" Cal. Law. Rev. 1971, p. 1298 ff..

2) US Department of Justice, January 1977, "Study of the Regulated Ocean Shipping Industry"

some bitterness towards the Conferences system. This is understood easily, because if generally, they are protected from the competition's excesses, it is thanks to a discipline behaviour, which sometimes is felt in the individual level, as a brake to the expansion's ability or to the need of independence, especially when it concerns non-leader shipowners inside the Conference.

P2 THE GOVERNMENTS

Most often the governments feel these inernational organizations encroach on their sovereignty.

It is a fact that, decisions as ports calling at or the tariffs structure, have important effects on the external trade of their countries notably.

Moreover they are tought of as deterents to the development of their national fleets, because holding by the Conferences rights, their own national shipowners can not exploit their sea-material as they would like.

P3 THE DEVELOPING COUNTRIES

The complaints ordinarily made by shippers or governments against Conferences, take a particular prominence in developing Countries.

Indeed, their only functioning can not resolve the problems settled by the exigency to establish proper and balanced order of transports, which can take into acount all the inevitable consequences that a regulation of the maritime traffic produces in the frame of Commercial relations between industrialized States and developing Countries.

It is right to think that the increasing volume of traffic coming from these developing countries, does not correspond to a noticeable increase of their merchant marine tonnage.

On the contrary, in terms of percentages refering to the total trade, it has suffered an continious decline in the past six years.[1]

The situation will have repercussions not only on their import, but also produces important secondary effects on the balance of political power and on their balance of payment.

In fact, the maritime transports Carriers require the payment in their national currency, or in any case in a "strong" currency, which is easily and advantageously convertible.

The lack of an effective national merchant fleet or the disproportion of the existing one facing the commercial trade come to them by a very negative rubric of their balance of payment.[2]

It is true that several industrialized countries are in the same situation, but it is also right that for them their maritime freights deficit is, in part, otherwise compensated completely by important articles which are lacking habitually in the balance of payment of Developing Countries

So we should not be too suprised if all these developing countries have tried to intervene by force against the Conferences system, in order to try to settle a maritime traffic regulation, which is granted with their national exigencies on one hand and on the other hand, have put forward the necessity of an international and uniform regulation of Conferences in UNCTAD frame as the particularly favourable seat for the solution of the problems of the international trade, and for seizing their authorities as regards developed States.[3]

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1) UN Publication II C, New York 1967, p. 287, "Creation and expansion of Developing Countries Merchant Marine"

2) UNCTAD Doc. 19 January 1970, ibid., "the effects of the Conferences system on the Control and the Politic of the third world countries currency"

3) Haji: "UNCTAD and Shipping", Journal world Trade law, 1972, p. 582 ff.

P4 THE SHIPPERS

Their criticism can be called natural. The Conference often appears to them as the administration, which is opposed to the free commercial negotiations.

Until the years following the second world war and seen the extraordinary explosion of seatransportation, as on the economical plan than the technological side, the shipper was more in touch with his shipowner than the Conferences, whose role was clearly more discret. He found there the advantage of direct relations, could explain more well his particular needs for creating a new traffic or defending those already existing, even discussing an interpretation relating to tariffs which seemed unjustified to him.[1]

Then during the 1950s some of these Conferences have taken, for diverse reasons, an aspect more and more exacting, particularly the increase of the size and then the cost of ships imposing financial agreements, sometimes pooling arragements in wich the shipowners see their personality breaking up.

In fact, the shippers being unable to be heard by shipowners interpretes with who they were in immediate relation, felt the necessity to get together in order to constitute an entity capable of obtaining a possibility of discussion with the Conferences; it is from here shippers councils are issued.[2]

Does that mean that shippers are deliberately against the notion of Conference? Of course not.

They find it has some advantages.(but, on the other hand), cooperation must settle, if one wants the legitimate need of the customers taken into account, which is the Conferences final aim, It is to assist it the best possible way.

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1) UNCTAD Doc TD/B/C4/20 Rev. 1, on:"Consultations and negotiations between shippers and shipowners"

2) Same Doc: "Consultations on maritime transport, creation of shippers organizations on the national and regional plan"

In general shippers reproach the Conferences with too high freights that a serious competition can not bring down, and their monopolistic power which particularly is exerted on the tariffs structure and increase, but also on the services organization.

In order to satisfy their needs, they wish to find beside them, a commercial comprehension, a service's punctuality and rapidity and a safety in the execution.

The maritime Conferences nature and the members it regroups make the international Community sceptical as to the equitable and egalitarian distribution of the traffic, and to the non-member exploiters. It is from this point of view that the research of legislative measures aspiring to correct the functioning is necessary, hence the apparition of regulation measures of these Conferences.

Section 2

THE DIVERSE METHODS REGULATING THE MARITIME CONFERENCES

The various criticism formulated against the maritime Conferences system, lead some countries to adopt an official or quasi-official regulation, in order to give them a new face and more credibility.

These measures do not answer to the situations exigencies as is testified by the number of complaints coming from maritime or non-maritime countries, about Conferences practices.

The proof is that the Conference of West European Countries, and Japan met in Tokyo in 1971 recognized that:

> "The Conferences could not continue developing unilaterally their polities and practices unless the public powers give them some directives in the public interest and without a certain intervention of the authorities in case of coming difficulties."[1]

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1) Ibid.

The Conferences have an international activity and most of them count, among their members Companies belonging to different states. Therefore more unilateral and national regulation concerning them is satisfying.

The necessity of any international regulation's formula being recognized asserts itself. Then the problem is settled by choosing the appropriate type and the required mechanism, taking into account the general advantage of diverse countries belonging to the activity's area of the Conference and conforming to practical and commercial considerations, unless provoking as far important jurisdiction's conflict between their national interests.

If we want to know if an international regulation would be preferable to a national regulation, we should also take into account an essential factor for developing countries, which by adopting a unilateral regulation risk to bring upon themselves reprisals measures on the part of Conferences or Governments, that would be prejudicial to their external trade, because manifestly they do not have the Great Powers economical importance.

From this point of view, any Conference system should be able to answer these principal criterias which are:

- to foresee a regulation of disputes as rapid as possible, taking into account their gravity.
- to settle an economical and simple procedure's regulation, as regards institutions and mechanism, and available for all the parties.
- to adopt an impartial regulation so that all the parties are determined to accept the decisions.

There are diverse methods regulating Conferences in the public interest:

- regulation by legislature
- by local and international arbitration
- by creating an international organization in charge of regulating them and ensuring the discipline.

P1 THE CONFERENCES REGULATION BY LEGISLATURE

Such a regulation would necessitate a previous agreement between the interested parties to decide if the promulgated law would only apply to Conferences having their headquarters in the country where they would be adopted, or if they also should aim at those being somewhere else, but calling at ports and the traffic of States proposing to settle regulations.

Any proliferation of texts would risk to increase the conflicts of competence number and thenrto provoke contests of national interests

It would be possible that many countries consider the regulation of the Conferences activities, as partial to the interests of those who promulgated it to the detriment of the other States interests.

It is what would happen notably, when the first have important regular liner fleet.

Now only the USA have laws which unilateraly regulate Conferences, that created an outery of criticism on the part of developed countries which maritime interests are menaced.

The multiplication of detailed national regulations putting down on the Conferences practice, doesn't seem bringing in the future, a satisfying solution to this problem.

P2 REGLUATION BY LOCAL AND INTERNATIONAL ARBITRATION

It is a principle that the expenses and access facilities to a court of justice for lodging or contesting a complaint are proportional to the importance of the problem.

Most of the complaints against the Conferences practices are essentially on freight rates questions, inequitable clauses in loyalty agreements ..., and they do not have all the gravity or the necessary character for being lodged in front of an international jurisdiction..

Then it would be a waste to start off an expensive international machine for judging less important disputes and which in most cases would be settled at less charges by more simple local arbitration procedures.

In this fact one would be abel to foresee:

- firstly the arbitration to the local level of relatively less important litigations, about which it would be essential to hear the parties and immediatly to solve without waiting for.
- the conflicts serious enough on Conferences politics and practices, and for which it would be more interes resting without excessive slowness to end at an international regulation, being authoritative, than to find an immediate solution.

In most of legal systems, a loser has the right to introduce before a higher arbitral court or a court of appeal for final decision.

Here the international arbitration would be definitive and there would be possibility of redress before a superior instancy.

Then it would be necessary to see that the arbitral sentences have binding power for the parties in contention.

P3 CREATION OF AN INTERNATIONAL ORGANIZATION IN CHARGE OF REGULATING THE CONFERENCES AND ENSURING THE DISCIPLINE

It has been said during the third session of the Maritime Transports Committee that its actual structure would be changed if it would be conceived on I.A.T.A. pattern, which ulteriorly would replace the Conferences system by another method more conformable to the actual needs.[1]

Another similar solution although with less heavy consequences, would exist to institute an international organization entitled

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1) I.A.T.A.: "Procedures and methods for users needs", JMM, 1978, p. 192-193

to regulate the freight rates and to impose to Conferences a discipline.

The material problem which would not fail to rise if these suggestions were kept is the cost and the importance of the organization, the indispensable secretariat and its representation in the principal ports, and commercial regions of the world.

A great number of executive committees should be created for looking after all the questions relating to Conferences considering the multiplicity of their types ensuring the transportation of diverse goods on different commercial routes of the world and of which everyone has its own problems.

The competition from outsiderships is also a factor which must be taken into account.

There is no precedent for backing up a theory according to which an organization of this order would protect the shippers interests as it is advisable to do it. I,A.T.A. is a carriers association and any group looking after maritime activities and conceived on this model, probably would be constructed on the same way.

It would be also hard to make so that the interests of small countries and more particularly of non-maritime states be protected enough.

Then its impartiality would be subject to guarantee and for that reason its decisions would not be powerful on the international level.

Section 3

CONFERENCES SELF REGULATION: RECENT EXPERIENCES AND CRITICISM

In a different way, the criticism we just mentioned can not lead to imagine that the Conferences selfregulation is able to give more satisfying results, even if it agrees with the Conferences headquaters states.

On that account the disappointing results of the Tokyo agreement are revealing, where the Consultative Shipping Group (C.S.G.), of which the Ministers of Transport of Japan and west European Countries are members, accepted the most developed form of the Conferences self-regulation: the CENSA text.

Indeed, Tokyo agreement at first continued to be the expression of two waves on which historically the maritime Conferences are based, and for which their functioning today is firmly criticized: i.e. as we have already noticed it, on the one hand the principle of the contractual freedom, and on the other hand the principle of the freedom of seas and traffics, which allowed secrecy of Conferences and to exclude any judicial or administrative control on their activities and decisions.

More over as a form of self-regulation, the CENSA Code of Conduct, by placing in a prominent position the opposition of the maritime Committees to any form of control on their action, is open to criticism.[1]

Particularly such a system seems insufficient being not associated to the use of concrete instruments able to ensure a control an the Conferences functioning, disengaged of deliberate fastening acts of shipping Companies.

The self-regulation of maritime traffics as proposed by CENSA either by the adopted solutions, or by the way they have been realized, although unfairly in some ways, seems to perpetuate the idea that the Conferences are organized so as to maintain the maritime market's monopoly in the hands of a limited group of shipowners in order to guarantee them maximum profits and to ensure the greatest advantage to the trade of the industrialized countries.

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1) Farthing: "UNCTAD Code of Practice for the Regulations of Liner Conferences, another view", JMLC, 1973, p. 467 ff., in response to the positive Analysis of CENSA Code by

B Arlev: "UNCTAD Code of Practice for the Regulations of Liner Conferences", JMLC, 1972, p. 783 ff.

About these last criticism particularly, it is rightly noticed that the proposed self-regulation is not taken into account.

- On one hand, there is the urgent political needs of economic planning manifested by some states to being interested in the traffic mentioned by the Conferences.
- On the other hand there is the interests of shippers non arganized in shippers Councils, importers and consumers, who are completely excluded of any form of participation to Conferences decisions.[1]

1) Particularly about the "shippers Councils role". UNCTAD 29 November 1976, the "Effectiveness of shipper's organization" TD/B/C4/154

PART TWO

TOWARDS AN INTERNATIONAL SOLUTION

OF MARITIME CONFERENCES?

THE UNCTAD CODE OF CONDUCT

Chapter I

MARITIME CONFERENCES IN THE PERSPECTIVE OF A CODE OF CONDUCT

Maritime Conferences are particular contracts, depending on a specific law, sometimes qualified as transnational.

They are agreements considered as regulating or restricting the competition according to shipowners' point of view on the one hand or shippers on the other hand.

Until recently the difficulties that have arisen, most of the time were regulated by Conferences decisions unilateraly.

At the present time, developing countries' shippers and shipowners organizations contest these practices and lay claim to an international regulation of maritime Conferences' conduct.

Still some developed States fearing the consequences of high freight rates on their economy than on their shippers organizations regulated in the national frame the maritime Conferences activities being in touch with coasts.

The USA in 1960, the Australia in 1966 and Thailand in 1969 attended to this question by promulgating laws.

Although the USA have an anti-trust legislation which is raising from their economical philosophy until 1958, the maritime Conference were not regulated in, because they were considered out of the Sherman Act as raising of foreign trade's activities.

But since the Supreme Court decided that the foreign trade fell under the influence of the Sherman Act, applying thereby the american legislation to maritime Conferences calling at this country.

For the USA any increasing tariff is not acceptable if it is not in the public interest as it is perceived by the American administration and Courts.

For that reason the national regulation seems normal even for developed states, the more so as maritime transports between themselves are what is more important than in their relations with developing countries.[1]

At the political level it is them in UNCTAD who requested for a code of conduct. Meanwhile among developed States, the USA have a very strong position towards maritime Conferences control.

So some apprehensions appear in the European Communities before Great Britain's entry reduced the acuteness of this problem, the British shipowners feeling loathing for a strict regulation of maritime Conferences. Until now Conferences were considered in Communal Law as escaping to Article 85 of Roma Treaty forbidding agreements.[2]

Concerning the planned Code of Conduct, deep differences of conception appear between the concerned parties:

- shipowners in the CENSA project, propose a contractual and private system.
- on the contrary the 77 Group got from the UN General Assembly in 1972, the vote of a resolution 3035 (XXVII) recommending the adoption of a Code of Conduct by an international convention.

In his lectures in the Academy of International Law in La Haye on "the Contemporary tendencies of International maritime Private Law" already presented the opposition in these terms:

> "These projects (CENSA and developing countries) are distinguished essentialy by a different policy to the basis: The CENSA project is based on the selfregulation * and the necessity to determine by Commercial Considerations without governmental intervenings.

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1) MacGee: "Ocean Freight Rate Conferences and the American Merchant Marine" 27, u.chi.l.Rev., 1960, p. 191-314

2) Thuillier: "Maritime Transports and Roma Treaty", "Maritime Transports and Common Market", RTDL, 1972, p. 279 ff.

The Latin American, and Afro-Asian projects assuming the principle that the Code should be formulated by the Governments and firstly dictated by political considerations."

The UNCTAD Secretary General evoked the possibility of a uniform and maritime legislation, every signatory state of the treaty undertaking to incorperate the dispositions of this in its national legislation.[1]

The same opposition meets again at the level of disputes' regulation, when a contractual and private Code opens on an arbitration of the same character, a convention calling in States, leads to the settlement of a more complex arbitration system.

We will see in details the problem of arbitration and conflicts inside the Conferences, its consequences and respective propositions of the 77 and developed States along our second chapter.

Because they constitute agreements limiting or eliminating the competition, the Conferences were the object of a public interventionism, particularly important.

Section 1

THE INCREASING WEIGHT OF STATES INTERVENTIONS

The maritime Conferences being in existence for almost a century and covering the world seas of a particularly dense system, are actually evaluated about 360.[2] Some say even 400.

Really this number is very hard to evaluate since Conferences as any human arganization come up and disappear or combine and this goes on continiously.

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1) Doc TD/104/Rev 1, ibid.

2) According to UNCTAD Doc TD/B/C.4/Rev. After all it is very hard to know exactly their number, the given numbers varying from the simple to the triple and according to the authors.

In any case, the right number doesn't matter; it shows the importance of shipowners conferences representing today 60 to 70 % of the traffic and interesting all the world economies, whether it concerns liberal, developing or socialist economy countries.

This being admitted generally it is recognized that the Conferences system plays a useful role by serving the international trade, but it is necessary to improve it, so as to make the unfair and discriminatory practices disappear and to conform it to the needs and conditions of our present time.

Facing that, states rallied defending their interests and trying to regulate the Conferences activities so as to contain their action.

This work will be done within regional meetings and UNCTAD interventions in order to draw up a general code within universal reach.

P1 THE DIFFERENT ATTEMPTS OF STATES

One assists at a succession of thoughts, positions and negotiations as from Governments, western States, shippers and shipowners than developing countries.

A The Bonner Law

It is taken for granted that 1961 was the starting point where the diverse vicissitudes of the Bonner Law[1] enforced in United States allowed many to awake to the consciousness of the Conferences vulnerability.

In 1958 an American shipping line not belonging to any Conference, got from the US Supreme Court a judgment notifying

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1) The shipowner's name, who launched the problem.

unlawful the double rate's system used by a Conference.[1]

Facing the gravity of such a sentence, the US Congress decided a more elaborate study of the problem resulting in the promulgation of the very famous Bonner Law of 30 October 1961, that caused considerable stir and changed Conferences into simple consortiums controled by the Federal Maritime Commission.

Indeed according to this law, the highest powers are attributed to the FMC allowing her to exercise a very precise control on Conferences, particularly requiring informations on freight rate's fixing that shipowners are not determined to give spontaneously. Thereby any contract she did not authorize was taken as unlawful and entailed a penalty of one thousand dollars a day.[2]

This Bonner Law caused storms in the years 1961 to 1964 and European Shipowners strongly supported by their states[3] vigorously reacted in particular to this last exigency that they considered as contrary to the regulations of the International Law and to the secret of affairs.

However it seems curiously that since 1964-1965 its application has not caused very big troubles. "A modus vivendi" has been reached in OECD's frame[4] in 1964 and it appears that European Shipowners made with this legislation.

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1) USA Supreme Court, 19 May 1958, FMC v. Isbrandtsen Co, 356 U.S.481 (1958) U.ch.l.Rev. 1960

2) Cumningham: "the US measures for their Merchant Marine and the consequences on the future of maritime transports", AFDI, 1964, p. 689 ff.

3) For instance France by Law no. 68678 of 26 July 1968. Jo 27 July 1968 prohibits:""any physical person of French nationality ... to report ... to foreign public authorities about documents or informations relating to sea transport ... These documents and informations are those the communication of which to a foreign authority would be contrary to the regulations of the International Law or violate France sovereignty.

4) The 14 States members + Japan. See Annual report of OECD maritime transports Committee, OECD, 1964, Paris, September 1965

Yet the dangers was not set aside completely. Recently at the time of the devaluation of the dollar, the FMC intervened once more in trying to control the tariffs increases made by the shipowner's Conferences.

To remark also that this American administrative control was particularly criticized by European and Japanese shipowners, who fearing that it could be contagious and inspire countries against Conferences, especially developing countries, with a strict legislation.

Well, curiously one finds that up to now this bad example has not been followed. This howeveredoesn't mean that these countries did not intervene towards Conferences. They have done it in a more indirect way, specially by confering important subsidies for developing their fleets, and by adding the flag of Convenience system to their national fleet.

So for instance, seme of these countries, such as Ceylon and Malaysia, under diverse forms and not without some interest to themselves decided that their national fleet will have the transport's monopoly on 30 or 40 % of the traffic which is considerable.[1]

In a way, these practices in turn were projected on the international level and that seems at the present time the most critical point of the evolution of the shipowners Conferences.

The diverse worries inspiring a certain awaking to the consciousness of an unavoidable competition from some otherscountries than Europe, USA, and Japan as well as an irreversible evolution have this consequence that in October 1971 a plenary session of European and Japanese shipowners and shippers drew up a Code of Conduct of Maritime Conferences, called C.E.N.S.A. Code, which will be transmitted to governments as the expression of the agreed position by shipowners and shipper's Councils.

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1) Ceylon F.I. says that its companies should have the preference compared with any other ship for the transport of goods from cinghalese headliner ports: JMM, 1972, p. 461

So how does this Code appear elaborated and adopted by industralized states intervening in Conferences?

B Developed States and the C.E.N.S.A. Code

After Tokyo's meeting, the European and Japanese Ministers of Transport decided to invite shipowners to bring into focus some works of discussion and arbitration for settling disputes between members and for allowing shippers to treat with Conferences in order to find a solution to all problems they may have.[1]

The Shipowners understood that governments prefered not to intervene but were ready to do it in case of the Conferences' inefficiency.

It was then absolutely necessary that the professionals get organized, be united and find the way for settling the technics of dialogue as suggested by Ministries in one resolution, and this case was at the origin of the CENSA in 1963 and consequently of shippers associations in different countries.

In July 1963 the national associations of 12 countries[2] created the Committee of European National Shipowners Associations (CENSA) which in cooperation with shippers councils elaborated and diffused on the 1st October 1971 a Code of practice based on the Self Regulation's principle.

The main points of the Code concern:

- the participation of shipping to the Conference with the possibility of consulting shippers organizations which wanted to come in either at the shipping's request or at the Conference's initiative and in case of disagreement one party or the other can call upon a Conciliator's shipping group, headed by a shipowner non directly involved

1) Informations on the differents measures taken by countries members in Tokyo: JMM, 1977, p. 1162, 1164

2) They are: Belgium, Denmark, Finland, France, Great Britain, Greece, Germany, Holland, Italy, Japan, Norway, Sweden. Later Spain joined the group.

in the concerned traffic.

- the organization and the administration with a new and important point: Conferences should annually publish a report of their activities.

- On the financial side shipping should present to accounting organizations all the information relating to their costs and receipts for the executed services in the Conference's zone.

- Finally some conciliation's procedures are foreseen in case of disagreement between shipowners and shippers.

After some modifications in Hamburg in 1973 this Code which does not implicate governements' intervention, received the approval of European shippers.

The policy lead by the Afro-Asian and Latin American groups in UNCTAD level is still more interesting.

P2 THE INTERVENTIONS OF THE GROUP OF 77

The arrival of developing countries on the political scene showed the importance of the problem of maritime Conferences.

Indeed in the Committee of Maritime Transports, created to UNCTAD in 1964, they had underlined the importance of this sector in their trade and balance of payment, and in Lima they had manifested their adherence to a fast and deep reform of maritime transports:

> "It is in the maritime transports' field that appears the most scandalous injustice. It is governed by a real dictatorship, a monopoly where rich countries impose regulations as they please while the third world is concerned in it in vital ways."[1]

1) The discourse of Madagascar Representative - UNCTAD Conf. Lima, Peru

In the Alger meeting in October 1967, they decided to adopt in short-dated several of action in applying the following principles:

- to recognize to their national companies the right to adhere on an equal basis to Conferences and similar organizations calling at the international trade.
- to adopt a promotional freight system because that applied on the goods coming from their countries is generaly high and often apposes the development of their exportations, especially in the period of fall in primary products.

So the offensive has been launched at the time of UNCTAD II, held in Santiago, Chile in 1973, when the 77 proposed a project of conferences' Code of Conduct, which project supposing an intervention of states, a strict arbitration and very precise clauses.[1]

The General Assembly rejected the most radical claims. The Group non the less continued re-affirming its will for making a Code of Conduct adopt and obtained a meeting of a diplomatic Conference in order to regulate this question.

After the meeting of a preliminary Committee in January and June 1973 and a first plenary session in November 1973, the diplomatic Conference with, of course, the support of developing and socialist countries, and in spite of the opposition of developed States[2] adopted on the 6 April 1974 in Geneva a Code of Conduct which becomes essentially what its aim was: a going shares agreement: 40-40-20, that is to say that in any signatory country cargoes should be shared in that way: 40 % for each of trading partners and 20 % for the thirds.[3]

1) Project of resolution presented by El Salvador in the name of the States members of the 77 Group: JMM, 1980, p. 222

2) becoming 19 since, could not fight with the other 77, although they control the Maritime Market.

3) ıs from Art 2 of the Code. For instance the traffic France--Senegal will be ensured for 40 % by the French Flag, for 40 % by the Senegalese Flag and for 20 % by all the others. By instituting this 40/40/20 system, then the Code substitutes to the free flags of shipping principle that of cargo sharing.

However this convention for a Code of conduct did not come immediatly into force. Art 49 of the text so defines its application:

> "the present convention will be in force six months after the date of which 24 States at least which global tonnage represents at least 25 % of the world tonnage would become contractual parties to the afore said convention."

If at the beginning 44 States have deposited their instruments of ratification[1], their liner fleet only represents about 21 % of the world tonnage. Therefore during the fifth UNCTAD in Manilla in 1979, the Group of 77 urged to adopt a resolution inviting:

> "the Governements of member states of UNCTAD which are not party to the Convention, to join it and to take into account the interest that developing countries have with regards to this code."[2]

This text indeed should take affect since countries representing 25 % of the world liner tonnage at least would ratify it.

The ratification by one of any big country of EEC will go beyond the 25 %. The legislative process is already far advanced in England, Germany, Holland and other EEC Countries.

According to the experts this doorstep of 25 % will be reached during the second trimester of 1983 or at the latest in the first months of 1984. From that time, the Code will officially come into force. Finally the Code became into force in October 1983.

The victory of the Group of 77 is not complete because the Code realized a compromise on some points. Therefore it would be interesting to see up to where its application spreads.

1) JMM, 1978, p. 421: "the list of countries which have definitively signed, ratified or adhered to the Convention.

2) TD/L.163. 30 May 1979
Also see the appeal for promoting the process of application of the code of Lamine Fadika, Ivoiry Coast, Minister of Shipping.

Section 2

THE UNCTAD CODE OF CONDUCT

The philosophy which understands the whole text, aims at organizing the maritime traffic of regular liners, institutionalizing Conferences practices on the whole in a favourable light for developing countries as the preamble of the Convention shows it:

> "Taking into account needs and problems appropriate to developing countries on the level of maritime Conferences activities which ensure their external trade."[1]

First the Convention on the Code of Conduct considered how maritime companies will participate in Conferences and how to share the traffic between them.

In that respect it is prescribed that Conferences normally should be "opened" even if a different regulation can be planned between companies members depending on their nationality which will be determined on the basis of 3 elements:

- their head office
- the locality where their effective control is executed
- the fact that their nationality is recognized by the authorities of the concerned country or by its legislation.

Concerning "national companies", they have the right to participate in the traffic of their countries on the basis of a simple request and of the only verification of their capacity and intention to ensure the service of which they want to cooperate.[2]

1) see text of the Code of Conduct: UN Plenipotentiaries Conference on a code of conduct. vol. 2

Moussu: "The historic code of maritime Conferences and its application." JMM, 1981, p. 2521-2528

2) First Art. Parag. 2

In return, concerning carriers belonging to third states in relation with those who are called at by Conferences, their admission is subordinated to the exam of:

- the volume of the traffic of carriers member of the conference and of its developments.
- the available space on board ships that the conferences own already.
- the effects that the admission of third carriers might have on the efficiency and the quality of the service provided by conference's decision.

Concerning the State's power of inspection and control on the Conferences functioning, it is foreseen that it will be realized indirectly and directly, especially through companies being under its control.

These last indeed, have the possibility to participate in Conference with both the right of veto[1] and the power of determining the step about decisions on the traffic of their countries by origin, and genarally about decisions on which the Conferences' agreement foresees the unanimity of companies members.

On the other hand, the national authorities in order to be able to exercise their functions and competencies immediately, should be well informed and should give their opinion especially on the admission of a new company and on all the questions concerning the traffic of their country, intervening if necessary in the obligatory consultations between Conferences and shippers.

This kind of interventions in accentuating the role of the State will give some rigidity to the Conferences' system which for that reason, will be able to reinforce rather than reducing the weight of outsiders[2] and consequently claim protective measures taken by the states themselves. Nevertheless all of

1) by Art 3 of UNCTAD Convention

2) This is just confirmed by the decision of some maritime companies to leave the continental North Atlantic West Bound Freight Conference and Far East other Conferences inorder to operate in as outsiders.

this is the price for the transition from the free market economy to a controled economy which necessitates a direct participation of states in the maritime traffic.

Finally the last part of the UNCTAD Code is entirely devoted to the regulation of conflicts relating to its application.

These conflicts can of course happen either between carriers belonging to the same Conference, between two or severeal Conferences, or between a Conference and shippers.

In this respect, it is well known that very divergent positions have always existed between developing countries and industrilized states.

While the former applied pressure to make the regulation an obligatory procedure of arbitration with an active legislation recognized by the national authorities of the interested states, the latter recognized only consultative or conciliatory procedures in order to end an eventual agreements about different evaluations or at the formulation of recommendations which in any case would not be imperative.

The Convention is limited to foresee an autonomous and essentially conciliatory process for very important conflicts in which the governmental organs can merely intervene in a marginal way by entrusting to national and competent authorities, minor disputes arising among carriers belonging to the same national group.[1]

In this way the position of industrialized countries has finally been fully subscribed, but in preserving some regulations of the arbitration procedure proposed at first by the Group of 77.

1) The dispute settlement machinery based on the consiliation is original and interesting, see:
Shah: "The dispute settlement machinery in the Convention of a code of conduct for liner conferences", 7, JMLC, 1975, p. 127

But certainly it can not be these residual elements to which can be added the existence of an organization's structure very closed to those foreseen for the constitution of an arbitration's body, which can denature the type of procedure foreseen in the Convention: as we have already observed it, this stays oriented to an exelusively type of conciliative procedure.

So being an instrument to the service of development, the Code represents an hybrid compound combining the will of a public organization of the maritime transport and the will of a public organization of the maritime transport and the will of maintaining institutions essentially turned towards the research of profits and profitability.

Chapter II

MARITIME CONFERENCE AND TECHNICS OF ARBITRATION

While traditionally, Conferences brought private persons into contact exclusively, the originality of the project depended on the introduction of interested States in the process of negotiating freight rates, and eventually in the regulation of disputes, with a convention being able to foresee as well an arbitration between States than a "mixed" arbitration being added to the habitual Private Law Arbitration.[1]

There is no doubt of a possibility of an understate control arbitration. Since a State would reproach a Conference for not respecting the Code of Conduct, other signatory countries of the Convention would be able to be of an apposed opinion, make their national shipowners or shippers benefit by the diplomatic protection and ask for the arbitration as regards to the other government.

We can wonder in the case of a mixed arbitration opposing a state to a Conference, if this in order to be able to litigate should not see its structures precised and acquire a juridical personality which all Conferences don't have.

Moreover the possibility of the diplomatic protection, the implementation of a Code of Conduct will lead to other problems of International Public Law.[2]

Generally, Public Law is also alerted because of the role attributed to States.

It is noticed that in the Code's project of the 77, 28 paragraphs mentioned governments, 2 left it up to them to take

1) Rodiere: "Arbitration inside conferences", TGDM, 1976, p. 473
   Robert: "The arbitration according to the international Private Law.", Dal. 1967, p. 339
2) Especially problems of International Economic law, see A Colin, p. 8 and spec. 24 ff.

any action, 15 sought their participation and 11 of them refered to the national legislation or regulation.

On the contrary in the CENSA Code which reflects the tendency of developed countries the word "Government" is used only once.[1]

Besides we should firstly examine the rule of the norms of the International Public Law, before studying the problem raised by the nature and the application of the arbitration.

Section 1

CODE OF CONDUCT AND NORMS OF INTERNATIONAL PUBLIC LAW

Will the Code of Conduct express directives that the interested parties will have to follow, conserving at the same time some freedom, of appreciation in their implementation, or on the contrary constrained regulations in all their elements?

Then the problem is not reduced at all to a choice in the formal plan between a recommendation included for instance in a UNCTAD resolution, and a treaty.

From the material point of view, it is considered that even in a treaty, the code can have only a directive's value if the signatories don't want to promulgate detailed and precised norms.

In the formal plan an obligatory treaty as it is, can have only a material content, limited to directives at least in that case it offers a superiority on the simple resolution because states bounded by such a treaty would be obliged to hold in respect by conferences concerning them some behaviour even if the norms define it with only some vagueness.

1) This is noted by the representant of the Federal Republic of Germany during the fourth Committee of UNCTAD III and who maintained that the role of Governments should be limited: Doc TD/111/C.4/SR.6.

To know if a convention was the most appropriate instrument for the implementation of the Code of Conduct was often evoked during the first session of the Preparatory Committee in January 1973 in Geneva.

Many industrialized countries indeed considered that the elaboration of such a code would be long and lay down bigger difficulties than a code not being obligatory.

Paragraphs 1 and 3 of the resolution 3035 establishing the mandate of this preparatory Committee propose to adopt:

> "a Convention or any other multilateral instrument being obligatory relating to a code of conduct of maritime Conferences."

The preparation of a treaty on the basis of the resolution 3035 is also reinforced by a report of the International Law Committee enclosing a commentary relating to the projects of articles on the right of treaties realized by the aforesaid Committee in 1966.

On the material plan then, it follows from the eventual adoption of a treaty a necessary elimination of dispositions which make reference to the national law of the country of origin or the country of destination.

But the Art 58I of the text proposed by the working Group II of the preparatory Committee of the UN Conferences for a Code of Conduct doesn't seem resolving it and declares:

> "If consultations end at an agreement, this will be communicated to be examined by the government of the country from where the cargo issues if the regulation of the aforesaid country requires it."[1]

1) TD/CODE/PC/WGII/L.3/Add.4

It is necessary to choose between national legislation and international regulation.

There is acrimony between these two approches; developing countries wish to benefit both by a recourse to the international regulation and by the protection that their own laws offer them.

The competition of the national legislation and the international arbitration would allow states to elaborate laws opposing to the application of sentences.

In fact some developed countries noticed that if any arbitral decision was liable to the legislation of the country in case of competition, the same dispute would be able to be submitted from that time to the international arbitration in a state, but not in another. This clause then would correspond to a general and unacceptable reserve.

This fundamental divergence between developed states and the Group of 77 find it natural prolongation in the conceptions of some and others as regards arbitration.

Section 2

THE PROBLEMS SET BY THE NATURE OF THE ESTABLISHING ARBITRATION

The arbitration can be foreseen by a treaty which as we have seen it will be normative or indicative and including obligations for the Conferences and the States.

Will the choice between these two types of treaties implicate the consequences on the kind of arbitration foreseen in the Code: understate control arbitration or "mixed" arbitration? (State-Conference)

1. If the treaty is indicative: the arbitration between states seems logical, as a right of directives leaves them some freedom of action as regards to maritime Conferences.

   Thereby they can have towards these some exigencies considered by their partners as going beyond the previsions of the Treaty; a conflict follows with the others signatories worried about, protecting their nationals and the recourse to the understate control arbitration.

   Yet even in this hypothesis of indicative treaty, we can conceive that states agree to refer their conflicts with the maritime conferences to the "mixed" arbitration.

2. If the treaty is normative: the mixed arbitration will become the most frequent procedure while this between states would be more exceptional.

   The primacy of this kind of arbitration explains itself because in fact the State importer is generally the principal closely concerned to the maritime Conference.

   Nevertheless if this is most frequent in developed States, developing Countries have essentially at the present time shippers's interests and can be into conflict with Conferences.

   On the other hand these countries wishing to develop their shipping in order to carry a more important part of the products they are exporting, can be opposed to some limitative practices of maritime Conferences.

Really the analysis of the attitude of these two types of states as regards to the arbitration is complex enough and is not reduced to the distinction between an indicative treaty as wished by industrialized countries, and a normative treaty as recommended by the Group of 77.

The former in this particular case feel loathing for an arbitration of Public Law and especially for any kind of institutionalization of this procedure. They prefer a contractual arbitration between professionals.

Developing countries on contrary desire an institutionalized arbitration perfectly defined in the Code, leaving any possibility to Governments for interfering in it.

So it will be conceived that these 2 types of states exercise different pressures on the Conference. The result may be a recourse to a international multiple arbitration, i.e. facing more than 2 litigants; 2 states and the maritime Conference for instance.

A scheme of an arbitral institution can from that time be proposed, that has been done by the Group of 77. We will examine it now by studying its application and then the recourse to more political than juridical norms.

P1 PRINCIPAL ASPECTS OF ARBITRATION, PROPOSED BY THE GROUP OF 77

A The application of Arbitration

The arbitration can be conceived in different ways:

- The CENSA Project presents a commercial arbitration regulating disputes relating to an interpretation of a contract or an agreement.
- The Group of 77 Project spreads out this scope and can affect for instance the fixing of freight rates.[1]

So it doesn't only concern a juridical arbitration, anymore, what on the technical plan would not surprise in the frame work of world economical law, which lifts up, not problems of a strict application of the legality, but problems of wide inter-

1) see Ref. al. cit. concerning these 2 projects

pretations supposing large powers for the judge or the arbitration.

Hence it may be asked whether there is not some contradiction to the Group of 77, as on the one hand they request for a vigorous regulation included in a normative treaty and on the other hand they understand to recognize to the arbitrator large powers of appreciation, taking especially into account the particular needs of developing countries for the fixing of freight rates.

One of the industrialized countries, Germany, in the present case attracted the attention that the arbitration generally concerned previous facts, while in the Group of 77 Code it might concern many points refering to a future conduct, topic being generally within the competence of the legislative power or the administrations.

For this country a large arbitration for that reason would include at the same time the legislative activity and the jurisdictional activity, what would create practical difficulties, especially when there is more than two parties.[1]

B The recourse to more Political than Juridical Norms

The conceptions of some developed countries which have envisaged a code of conduct, especially during Tokyo meeting in 1971, are founded on the traditional basis and foresee only a regulation of the Conferences activities.

In return the Group of 77 project of code should be perceived as one of the application of the UNCTAD philosophy.

Resolution 3035 of the General Assembly which delimited the task of the preparatory committee specifies that the code

1) TD/CODE/1 and CODE/PC/5, p. 85

"should fully take into account the needs and the difficulties characterising developing countries."

So the Group of 77 Project sticks to break up the strict juridical and formal equality in the name of the real and economical inequality.

In order to locate the originality of this claim, it can be compared with a disposition of the European Community Laws, the Art 85, Parag. 3 of the Roma Treaty which foresees that can be validated the agreements contributing to the economical improvement on condition to attribute to the users an upright part of the realized profit.[1]

The basic idea is the same but taking back in the Group of 77 project, it exceeds the simple estimate of a profit for searching for a finality of development notion singularly more extensive.

Yet in the framework of the maritime Conferences Code of Conduct, this inequality and compensating claim very frequently invoked between states level in governmental Conferences, spreads out this initial plan so far as maritime industries constitute private activities in most of the countries.

So we must not be suprised at the declaration of developed States' spokesman in UNCTAD:

"All the countries, of this group consider that governments should not interfere in the commercial and current activities of Conferences nor in their relations with shippers.

Their interference in matters, such as freight rates can create conflicts between national interests."[2]

1) Thuillier: "Maritime Transports and Roma Treaty", "Maritime Transport and EEC", RTDE, 1972, p. 272 ff.

2) Doc TC/111/C4/SR6, p. 45

P2 THE REPERCUSSIONS OF THE PROBLEM OF RATIFICATION ON CONFERENCES

Some states are going to ratify the Code, others will not. From that time, different problems can come up, creating conflicts between the national legislation and some conferences agreements.

Let us propose 2 theoretical examples:

1. Supposing that Senegal signs the Code of Conduct and Sweden is not a signatory, as it exists with the agreement of Senegal a Conference Senegal-Suede for the transport of phosphate. A Swedish Company not admitted by the Conference prosecute for "unfair competition" in front of the Swedish Courts of justice against the other Swedish companies that she accuses to have participated in a manoeuvring order to exclude her from the traffic Senegal-Sweden.

   We suppose that the action is receivable before the Swedish Courts which would have a large conception of the unfair competition.

   Can these Courts consider that the Code of Conduct justifies the behaviour of the Swedish shipowners although Sweden didn't sign?

   If judges declare that the Code is a "res inter alios acta" they give right to the demander and make in due time the Conference burst. This hypothesis has a theoretical character but is not inconceivable.

2. Another hypothesis lifts up a second type of problem. Let us suppose that in a Conference agreement we adopt disposition offered to the Code of Conduct, concerning a traffic between non-signatory States, Togo and Sweden for instance.

Are shipowners from signatory States at fault by participating in some Conferences agreements opposed to the Code of Conduct?

In other words, do the regulations of the Code of Conduct constitute "personal obligations" as regards to shipowners from signatories countries to which they are in fault, or are they "real and geographical obligations" applying themselves to traffic at origin and, or, at destination to a signatory Country?

In this last case in our example, we can't blame shipowners because the Code of Conduct by hypothesis would not be applied to the concerned traffic.

Section 3

THE LIFTED PROBLEMS BY THE APPLICATION OF ARBITRATION

Although as we underlined it, some conflicts will implicate not only 2 but 3 parties: State, maritime Conference and Shipper.

The presented report in UNCTAD by the Working Group III of the preparatory Committee of the UN Conference for a Code of Conduct of maritime Conferences, preserves the classic sheme of the international arbitration through diverse variants:[1]

> It seems in some way to take as a pattern the Convention for disputes settlement relating to investments between States and nationals from other countries.[2]

For instance a conciliatory procedure later to the negotiation and consultation and former to the arbitration, is foreseen.

1) Doc. TD/CODE/PC/w.g.III/C.3/ADD
2) Rideau: Bird Convention 18 March 1965. International Arbitration.

On the other hand, the report foresees the creation of an Arbitrator Board the nomination of which is susceptible to 2 variants:

Variant 1: each contractual State will designate the Governments of the contractual parties, and the Governments of UNCTAD States members will designate the members to write on the Board.

Variant 2: The Board is established by the UN Secretary General on the basis of lists of experts provided by the Contractual States.

Yet, two major differences separate Bird Convention from the actual report on the arbitration in the Code of Conduct.

On the one hand Art 25 of Bird Convention for disputes Settlement relating to investments between States and Nationals from other States, limits the application of arbitration to the only juridical conflicts.

In the report on the Code of Conduct, the possibility claimed by the Group of 77 of an arbitration on a question, such as the appreciation of the increase of freight rates depending on their development, accounts for this divergence.

On the other hand Art 27 of Bird Convention suppresses the possibility of the diplomatic protection to the State the national of which is investing.

In the project of report on the Code of Conduct, the disposition is reversed in some way as Parag 72 proposed by developing countries disposes:

"The Governments of interested developing Countries will be allowed to participate fully to the procedures of arbitration the subjects of which will be the disputes relating to freight rates, surtaxes and conditions of carrying products that these countries import."

We understand the preoccupations to which this difference of conception answers to the Group of 77: In the first case the possibility of the diplomatic protection is refused to a investing state i.e. developed state. In the second case, the intervention of the State aspires to protect the interests of a developing country.

On the other hand, three specific problems are brought up by the application of arbitration. It concerns essentially:

- the appropriate law
- the granting power to the precedents
- the penalties of which the arbitration can be suited.

P1 THE APPROPRIATE LAW

The first article proposed by the Working Group III of the Preparatory Committee of Plenipotentiaries Conference in charge of elaborating a Code of Conduct of Maritime Conferences disposes:[1]

1. The award is dispensing in conformity with the dispositions of the Code.
2. In case of silence of the Code on one point, court arbitrators apply:

   Variant 1: The general principles of the International Law of Justice and Equity and the uses of the International Trade and shipping.

   Variant 2: The Law that the parties have determined on a common agreement, or in default of such an agreement, the law that the Court, the arbitrator estimate to be the best appropriated in this particular case. In any case they take into account the uses of the trade.

1) Doc TD/CODE/PC/W.G.III/L3/ADD

It stands aut of a comparison of the two variants[2] that:

- The first affirms in a clearer way the reference to the international law. Generally we know that the recourse to the General Principles of the Law constitute a clause of an internationalization of the arbitration.

- The second variant rather seems to refer to the contracting law, and in case of disagreement between the parties, the judges or the arbitrators have a large freedom to choose the appropriate law, without presumptions in favour of the international law.

Developing countries are opposed to developed States, especially on the interpretation to give to the terms "Uses of International Trade and Shipping".

They agree to this utilization with reservations only according to a constant attitude also adopted in their general contestation of the classical international law, on account of their non-participation to the elaboration of this last one.

In that respect and not only for protecting themselves against the trade's uses, but also for promoting their own needs, the Group of 77 requested the insertion in the Code of directional norms, so drawn up in the section A.1 and 2.[1]

A Objectives and Principles

1. The three basic and interdependent objectives of the Code are the following:

   a) To promote the regular expansion of the World Trade generally, and particularly the Growth and the diversification of developing countries' trade, so as to contribute to the settlement of an international division of a new and more equitable labour between

developed and developing countries.

b) To promote a new structure of world maritime transport, compatible with this new frame of commercial exchanges in which the developing countries' merchant marine might play an important and increasing role.

c) To protect shippers' interests in developing countries particularly by setting up a balanced partition of rights and responsabilities between maritime transports' parties.

2. If we agree with these fundamental objectives, logically we are led to recognize among others, some basic principles, offering a particular interest to developing dountries.

a) The principle according to which the freight rates should be fixed to a compatible level with the comercial objectives of developing countries.

b) The principle according to which the maritme Conferences should proceed to consultations with shippers, shippers organizations and interested governments, including those from non coastal countries, before making decisions which have repercussions on their interests.

c) The principle according to which the practices of maritime conferences should not induce any direct or indirect discrimination contrary to commercial and maritime interests of developing countries.

d) The principle according to which developing countries have absolutly the right to carry an important and increasing part of cargoes which come into their external trade and to ensure the full development of their national merchant marine.

e) The principle according to which developing countries maritime companies should be admitted on an equal footing in all the Conferences the activities of which present an interest for the trade of these countries.

f) The principle according to which developing countries have the right to protect and to develop their national merchant marine and according to which the adopted measures with this end in view should not be considered discriminatory nor should it involve any reprisals.

g) The principle according to which public authorities have the right to fully exercise their power of control in scopes which arise from their competency in order to ensure the application of the Code.

h) The principle according to which the disputes concerning the application of the Code which are not resolved by consultative way between maritime Companies or between Conferences, shippers and shippers' organization, should be submitted to procedures determined in this Code.

Once again the cleavage between the conceptions on the object of the Code of Conduct appears: Developed States consider too general the objectives of the Group of 77, while for them, the Code is called only to regulate maritime Conferences.

On the contrary developing countries conceive the Code in a much larger perspective, as one of the instruments of their economical development.

P2 THE PROBLEM OF THE PRECEDENTS

The standardization of the jurisprudence in the application of the Code is, of course, desirable, but the appeal for precedents risks repercussions against particular difficulties

on account of the importance of some considerations in most of the arbitration's award. Yet some motions have a juridical meaning, such as discrimination and can be the object of a jurisprudential definition.

How to ensure this standardization? Can we conceive to trust it to a higher agent?

Concerning the arbitration between states which seems to be exceptional[1], it would be possible to conceive that the Convention foresees a prejudicial recourse of the interpretation of the Code on the request of a state.

This recourse would be able to take the contentions form and arises from a clausis of the Convention basing the obligatory competency of the Court on the basis of Article 36 parag. 2 of its statute.

The recent reform of the Courts' regulation would be susceptible to facilitate and to accelerate the procedure. Article 26 of this text gives to the parties a quasi-determinant part in nomination of 3 judges of the Chamber, foreseen by Article 24 of the statute. This one had never been utilized until now, but we can think that this reform which introduces the arbitration's philosophy in the Constitution of the Chamber in order to give to the Court the knowledge of some affairs, will be able to incite states to utilize this new disposition.[2]

However in our field, this procedure seems heavy. As for a request of a consultative judgement, the procedure would be more complex as much again, because it should be requested the UN Organization, in fact by its General Assembly, on the initiative of UNCTAD.

1) as in the case of a signatory state of the Convention on the Code of Conduct which adopts a regulation apposed to that one or exploits a public cooperation fleet or exercises a "diplomatic protection de facto" of his shipowners and shippers by meaning to defind his own interests.

2) Rideau: "The nature of the arbitral organ", p. 19-23

This decision is not the only open to criticism. It is also the case of the one which in the project of report affects the possible cancellation of the award.

P3 THE SANCTIONS AND THEIR APPLICATION

Two series of problems appear: on the one hand, the possibility to request the cancellation of the award and on the other hand its execution.

1. The possibility to request the cancellation of an award for irregularity in drafting or the obvious overpowering of the Court is foreseen by Article 52 of Birds' Con vention.

   Such a request is submitted to a committee composed of members different from those of the Court and not having any ties with the interested parties to the conflict.

   On the contrary, the project report on article 1 III E decides that the award will be squashed, will not be executed, or will not be recognized if the request adressed for that purpose by one of the parties to a competent Court of the country, where the recognition or the execution is requested, invokes one of the following reasons:
   - the Court neglected to statute on important points of the litigation, or committed an overpower, i.e. if the award carries on dispute non relating to the compromise or containing decisions which exceeds the terms of the compromise.
   - the constitution of the arbitral Court where the procedure of arbitration was not conformable to the convention of parties to the disposition of the present code.

(This system is very shrinking with regard to the Bird system.)

2. The penalties set a double problem: their determination in the arbitrator's award and their application in case of its non-execution.

   a) In the arbitrator's award, a distinction can be made:

      - If it is about a proposition of modification of the maritime Conference's freight rates, the arbitrator will be able to declare it non conformable to the Code, that will prevent it to be integrated to the tariff.

      - If it concerns a decision taken by the maritime Conference, the penalty will consist in its cancellation, with eventually the obligation for the Conference to take one in a contrary way. It will be for instance, the admittance of one shipowner in the Conference which had been refused to him before.

   b) In the case of non execution of the arbitrator's award by the Conference, the State will pursue in front of its own Courts all the members of the maritime Conference, including foreigh shipowners.

This question of the arbitration of conflicts in the maritime Conferences is a very difficult subject, although the penalties are easier to apply on the national plan. It is on the international level that they are always very difficult.

But probably one day these cases of international arbitration would be regulated by first seeking what penalties can be a applied and then address the procedure of arbitration.

Indeed, it would be useless to have an award which nobody can apply on account that one country would find it contrary to its independence, as it recently happened in several arbitrations in USA, relating to one of the large Asian countries, which just as it was about to apply the judgment says:

"I don't recognize this award, it violates my national independence and my integrity."

CONCLUSION

The phenomenon of Conferences is essentially based on two freedoms, today criticezed and limited by any juridical system:

- On one side, the freedom of maritime traffics
- and on the other, the contractual freedom.

Freedoms which have been popular during the last century, when Conferences in fact started to assert their authority in the practice of maritime traffics, with the considerable increasing of exchanges, due to the success of the industrial revolution and to the technical progress developed in shipping.

Yet, their functioning and the scope of their agreements present certain differences. Some of them have an historical cause, others are due to the maritime route, the traffic and to the origin of participating companies to the strength from which shippers or their organizations neggtiate with them, to their statutory regulation by the governments.

It is for these reasons that the maritime Conferences, fully enjoying these freedoms at the beginning of the nineteenth century, could successfully satisfy to these exigencies, realizing a policy of agreements which at the same time protected the interests of the shipowners members facing outsiders and traffics

But we can go farther: In some Conferences, pool systems are organized, and in this framework shipowners sometimes share out between them the freights according to quotas fixed in advance as it appears that a loyalty tie under one form or another should continue to exist for maintaining the services of regular liners facing the external competition.

So in spite of the criticisms which have been made to the Conferences' system, we can not help noticing that this one has promoted the rationalization of the liner maritime traffic by realizing among others:

- the uniformity of tariff which allows to reduce the differences existing between big and small shippers.
- the regularity and continuity of the service relating to the maritime traffic on the considered surface, including ports which because of their minor commercial interest, would be excluded of it otherwise.
- the convergency in the maritime sector of required investments for the renewal of the fleet thanks to the continuity and the regularty of its employment.

Then for these reasons, even when a more energetic public intervention in their functioning was wished, or when the nature or some abuse of their activity were criticized, the Conferences' indispensable role in order to ensure an effective march of the shipping liner, has always been wished.

During these last decades, the line Conferences' countenance, their functions, their classic positions in the maritime transports, have changed deeply.

The Conferences' system at least, nationalized itself under the effect of the Code of Conduct. In a parallel direction, it suffers under a competition becoming sharper in a maritime world, where each state endeavours to become carrier: the development of the Soviet and Eastern Countries Commercial fleet, the competitiveness of which is not necessary to underline, the apparition of those from some new industrialized countries, strike harder at the European shipping, by eroding singularly the traffics they held.

The increasing public intervention in a private system results in the transformation of the nature of the institution and the diversification of the served interests: to the private interests of traditional shipowners, is added now those from states in a hard coexistence.

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